United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2643

To be argued by
KEVIN CONCAGH

United States Court of Appeals
FOR THE SECOND CIRCUIT

MATTIE G. DIXON, as Administratrix of the Estate of L. C. SHERMAN, JR.,
Plaintiff-Appellee,

vs.

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP., RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD L. STINARD, EMERY ROTH, RICHARD ROTH and JULIAN ROTH, d/b/a EMERY ROTH & SONS,
Defendants-Appellees,

CITY OF NEW YORK, THE BOARD OF INQUIRY OF THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, and LOUIS BECK,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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INDEX

TABLE OF AUTHORITIES

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Preliminary Statement

This is an appeal from an order of the District Court for the Southern District of New York (Knapp, J.), which denied the City's motion for an order of protection pursuant to Rules 45(b), 45(c) and 26(c) FRCP, quashing a subpoena *duces tecum* to produce certain records and equipment served upon the Department of Buildings of the City of New York (a non-party).

Question Presented

Did the District Court err in finding that there was no general privilege to withhold the data requested?

Facts

The statement of facts in Appellant's brief is incomplete and therefore a more complete statement is required.

On May 3, 1972 a steam pipe explosion took place at 80 Pine Street, New York, New York in which seven people were killed (28A).

A Board of Inquiry was convened at the direction of Joseph Stein, Commissioner of the Department of Buildings, for the ostensible purpose of inquiring into the cause or causes of the accident and for the purpose of formulating remedial legislation or regulations to prevent such occurrence in the future, and to determine if there was a violation of the Building Code and/or any of the Rules and Regulations governing holders of Department of Buildings licenses (22A).

Numerous persons with varying connections were called or subpoenaed to give testimony with respect to the aforesaid explosion before the Board of Inquiry. They were not afforded the right to have counsel present, but were assured that their testimony would remain confidential. Equipment apparatus and mechanisms which were involved in and gave rise to the explosion were literally ripped out of the building structure and destructive testing was performed by the Board's experts. Various plans and building specifications on file with the City of New York were segregated by the Board for their examination and were not available to the litigants for their examination (26A). The Board's ultimate recommendations and proposals were released to the public but its conclusions and findings of fact were not (2).

This action was commenced on February 8, 1974 (A). On September 19, 1974, Louis Beck, Counsel to the Department of Buildings, was served with a subpoena directing him to produce for discovery the complete report of the Board together with the names and addresses of witnesses appearing before it, and the items of physical equipment examined by the Board (18A).

The City, as stated in appellant's brief moved to quash on varying grounds, among them privilege and undue burden (20, 22A-23A). In an affidavit in opposition to the City's motion, Dennis M. Karsch, Esq. stated:

> "Mr. Beck states in his affidavit that the preparation of a list containing the names and addresses of witnesses who appeared and testified before the Board would be unduly burdensome and expensive to the City of New York. In this respect we must wholeheartedly disagree.
>
> To begin with Mr. Beck fails to indicate how many people, in terms of numbers, testified before the Board of Inquiry. Certainly, the Court would be entitled to at least a minimum showing by the City that the number of witnesses was in the hundreds or perhaps in the thousands. In the absence of this showing, Mr. Beck's contention is without merit. To go on further, the Board states that the physical evidence examined by them has been returned to the owners of the building. Your deponent is not in the position to deny this fact. However, upon calling the attorneys for the Rudin Management Corp., the owner-managers of the building, I was informed by Mr. Quirk that he had no knowledge of the return of any equipment." (25A)

On October 10, 1974 the City's motion to quash came on to be heard before Judge Knapp. During oral argument of the motion, Paul Aranow, Esq., of the Corpora-

tion Counsel's office, put forth the suggestion that the material contained in the report be subjected to *in camera* inspection to determine if privilege attached to any portion of the report (38A). Judge Knapp although ruling that there was no general privilege to withhold the data requested, in an effort to accommodate both parties who were agreeable to *in camera* inspection, referred the matter to Magistrate Jacobs (38A, 48A).

On October 22, 1974 our office was notified by Mr. Aranow that he would produce the Board's report with the exception of its conclusions and recommendations at the Magistrate's hearing (40A). At the start of the hearing held before the Magistrate on October 24, 1974, Mr. Aranow produced the Board's report and made the entire report available for inspection to all the parties. Further, it was at this time that certain defendants to the lawsuit read certain portions of the report which numbered several volumes (54A). Mr. Aranow agreed that the Board's records would remain available at the office of the Corporation Counsel for inspection (55A). The City later refused the parties to this action access to any portion of this report.

On November 13, 1974 Megistrate Jacobs rendered the following report:

> "A hearing was held before me on October 24th at which there appeared counsel for the plaintiff, for the City, for Adsco Manufacturing Corp. (manufacturer of the joint which allegedly caused the explosion), for Richard Roth and Julius Roth (architects), and for Consolidated Edison. At this hearing counsel for the City had in his possession (1) transcripts of testimony of 27 witnesses, together with exhibits; (2) a report of George J. Fischer, a consulting metallurgist who made an analysis of certain expansion joints and other physical evidence, and (3) the Board of Inquiry report,

the latter portions of which contain 'conclusions' dealing with the causes of the accident and 'recommendations' as to legislation. I was also advised that counsel to the Board (Louis Beck) held Certain physical evidence and had returned certain other physical evidence to the owner.

The City stated that if directed by the Court it would have no serious objection to producing the data requested except for the Fischer report and so much of the Board Report which contained the conclusions and recommendations.

Where a governmental body has made an investigation of an accident, public policy dictates that any facts ascertained by it, as distinguished from opinions or conclusions, should be discoverable. However, the discovery of opinions or recommendations may chill a full expression by the investigating body of its views and should as a matter of public policy be protected. This position finds much judicial support. In *Reliable Transfer Co.* v. *United States,* 53 F.R.D. 24 (E.D.N.Y. 1971) plaintiff claimed damages to a vessel when it ran aground at a point where plaintiff claimed a buoy was not operating. After investigation by the Coast Guard, the government made available the findings of fact of the investigating officer and the transcripts of testimony, but refused to produce the conclusions and recommendations. In upholding the position of the government, Judge Judd said, 'The facts found by an investigating officer should be made available to the adversary under general principles of discovery, and are being made available in this case. Free discovery of opinions based on those facts might cause undue reticence by the investigating officer, and prevent fulfillment of the purposes of the investigation' (p. 23). In *Craig* v. *Eastern Airlines, Inc.,* 40 F.R.D. 508 (E.D.N.Y. 1966) it was decided that the government, defendant in aviation accident case, need produce only

the evidence presented at a hearing before the Civil Aviation Board and factual material but not 'conclusions, opinions and recommendations of the FAA expert.'

Accordingly, I recommend that the City be directed to produce for inspection and copying by all parties to the action, including defendants, the transcripts of the testimony of all witnesses and related exhibits, the physical evidence, and the report of the Board of Inquiry except for its 'conclusions and recommendations.'

The Fischer report which I have examined will be separately discussed. This report (consisting of 13 pages and 32 figures or illustrations) was rendered to the Board at its request. The metallurgist did not testify. The report is a metallurgist analysis of certain extension joints and other physical evidence at 80 Pine Street and also of the same type of joint used at two other premises (59 Maiden Lane and One Chase Manhattan Plaza). The latter portion of the report (pp. 11 et seq.) contains certain conclusions. In keeping with my views as to the report of the Board this report should be produced except for its conclusions."

POINT I

The City has failed to make the necessary showing of unreasonableness and undue burden sufficient to quash the subpoena.

It is clear that bare statements of unreasonableness and undue burden are not sufficient to sustain a motion to quash, where the material requested is relevant. Rule 26 of the FRCP states that parties "may obtain discovery *regarding any matter not privileged, which is relevant . . .*" The rule goes on to state that where justice requires, to protect a person . . . from annoyance, embarrassment, oppression, undue burden or expense the Court may make one or more orders regulating or denying the discovery.

There is no contention by appellants that the items sought here are not relevant, indeed a report which details findings of fact concerning the causes of an explosion which is the subject of litigation is far from being irrelevant.

The City contends that the production of this material is unduly burdensome. Mr. Beck's affirmation in support of the motion to quash is completely devoid of any facts which lend credence to his contention that the compilation of a list containing the names and addresses of witnesses would be unduly burdensome or expensive. Nowhere does he mention the number of witnesses called before the Board or the form or manner in which their testimony was taken. Surely, in the absence of at least a minimum showing a motion to quash on these grounds must fail.

In conclusion, the City's argument on the aforesaid grounds is a specious one and does not warrant any further elaboration by appellee.

POINT II

The invocation of the common law doctrine of privilege is inapplicable.

At the outset it should be recognized that there are two broad categories of privilege which may be asserted by a government.

The first is that which protects the government's own operations from public view. In this category, are for example, all protections to prevent disclosure of national security information, diplomatic negotiations or police activities. They are each necessary to protect the integrity of governmental operations and they each protect governmental information which by reason of the very nature of the activity, per se, requires secrecy. These protections all derive from the common law, exist to ensure effective governmental operation, and have been emplaced, developed and applied by the courts. They are subject, on a case-by-case basis to scrutiny by the courts. While this category of privilege has been granted by judicial precedent it is never granted on mere assertion of the privilege by government. The courts have always inquired into the assertion and on a case-by-case basis determined its validity in the case at hand, weighing the need for secrecy against the need for information.

Firth Sterling Steel Co. v. *Bethlehem Steel Co.* (1912, D.C. Pa) 199 F 353; *Pollen* v. *United States* (1937), 85 Ct. Cl. 673; *Pollen* v. *Ford Instrument Co.* (1939, D.C. N.Y.), 26 F Supp. 583; *United States* v. *Haugen* (1944, D.C. Wash), 58 F Supp. 436; *Bank Line* v. *United States* (1948, D.C.N.Y.), 76 F Supp. 801; *O'Neill* v. *United States* (1948, D.C. Pa), 79 F Supp. 827, vacated on other grounds (CA3d) 174 F2d 931 (recognizing rule); *Cresmer* v. *United States* (1949, D.C.N.Y.), 9 F.R.D. 203; *Totten* v. *United States* (1876), 92 U.S. 105, 23 L ed 605, *infra,* and *United*

States v. *Burr* (1807, CC Va), F Cas. Nos. 14692d and 14694, *supra,* § 3.

The *Cirale* case cited by appellants discussed the foregoing privilege extensively in its *dicta.* Without holding, that such privilege existed with respect to the Board's report, the Court reversed the lower Court's rulings granting discovery *upon a failure of showing of adequate "special circumstances".*

Appellee does not attempt here to deny the existence of a common law privilege relating to governmental communications as put forth in *Cirale,* but is simply stating for the record that with respect to this material the aforesaid privilege does not attach.

The second category of privilege for the government has the same general broad purpose: efficiency of governmental operations. The thrust of the protection is different however. In this area, the protection, though asserted by governmental privilege is actually afforded to persons who have given information to the government. The privilege is granted in order to encourage the volunteering of information and ensure truthful and full disclosure to the government. With but two exceptions, criminal informer and Grand Jury testimony, this category of privilege is customarily applied only where it has been specifically afforded by statute.

The statutory protections are of three types:

(1) Privacy for reports filed or information furnished;

(2) Prohibition against disclosure by the govvernmental agency with or without agency discretion to modify the prohibition; and

(3) Absolute prohibition against disclosure or use in any civil or penal litigation with or without agency discretion to modify the prohibition.

Numerous examples of these categories of privileges may be found in the statutes of New York State and of the United States.

In assessing the validity of the assertion of governmental privilege it is necessary in the first instance for the Court to determine in which of the two areas the information sought to be protected lies. If in the first, i.e. protection of governmental operations add information, the Court must assess the need for the information against the government's need for secrecy. If the information lies in the second area, i.e. protection of the confidentially of persons furnishing information to the government, the tests and standards are entirely different. The statutes which afford the protection are the same which enabled the government to obtain the material to be protected. The Court will have no need, then, to examine the material itself (other than to determine, if disputed, that the information was obtained by the government pursuant to a statute which affords a privilege). The only issue for the Court will be to interpret the statute to determine the extent and nature of the privilege.

In the instant case, the City claims no inherent secrecy for the information sought. In fact, in support of its application it states:

> "In order to perform its functions, often there must be assurances given to prospective witnesses that their testimony will be treated as confidential; in order to elicit information which might otherwise not be forthcoming, or as to which constitutional protection may be claimed by such witnesses."

In the instant action, there has been no mention of military secrets, or police security which would warrant immediate finding of privilege, the information sought here clearly then could only fall then within the second area of protection. Nowhere has there been suggested any prece-

dent for the proposition that absent the statutory grant an administrative agency may on its own authority give "assurances . . . to prospective witnesses that their testimony will be treated as confidential", or may not be used against them in order to obtain their waiver of the Fifth Amendment. To the contrary, under the rules of statutory construction, the many instances of the statutory grant or privilege coupled with the power to obtain information demonstrate the Legislature's intention to retain the exclusive power to afford a privilege protecting those who, in response to compulsion or request, furnish information.

Judicial intervention in this second area of privilege (i.e. protection of communicants to the government) is limited to determining the presence and scope of the statutory grant. Just as the power to obtain the information is a grant determined by the Legislature, so the manner in which that power is to be used, is also to be determined by the Legislature. The lack of privilege in an agency's enabling statute is not an invitation for the Court to act, but when viewed in the light of those many statutes which do confer a privilege, an indication that no privilege is to be afforded.

In *Cherkis* v. *Impelliteri,* 307 N.Y. 132 (1954), cited by appellants, the Court of Appeals held that reports made by the Commissioner of Investigation to the Mayor of New York were protected by Sections 1113 and 1114 and not under a common law privilege. Further, as Judge Breitel stated in *Langert* v. *Tenney* (1958), 5 A.D. 2d 586, 173 N.Y.S. 2d 665, there is a highly confidential and investigatory function performed by the Commissioner of Investigation. In the within case there is no highly confidential investigation by the Board of Inquiry and the Buildings Department. This case is founded upon a different principle. There is no investigation that is confidential here. In fact, the investigation has ended and the the Board of Inquiry has made its recommendations. By

virtue thereof, there is absolutely no reason why the City of New York should not divulge the information in its possession. In *Cherkis, supra,* Judge Van Voorhis even foresaw problems of equating other Department Chiefs with the Investigation Commissioner, when he said:

> "The result would be different if the Commissioner of Investigations were a different kind of office."

The Commissioner of Buildings occupies no confidential relationship to the Mayor, nor can he in any way equate himself with the Commissioner of Investigations. The Investigations Commissioner has a function of investigating frauds, crimes and scandals, which investigations, if made public, interfere occasionally with governmental functions. No such circumstances exist in this case.

It is clear that the reports involved here are not the type of documents which are privileged upon the grounds of public policy as involving military security, diplomatic secrets, police information and discussions between executives concerning policy which if revealed would jeopardize the public interest as the Court in *Cirale* was alluded to. Rather, these are simply accident reports compiled by various City agencies after investigation and assimilated by the Board with a view to determining the causes of the explosion and to make recommendations to avert similar accidents in the future. In the final analysis, appellants have failed to show that the Board's report contains privileged material and this Court should not and must not allow judicial control over the evidence in any litigated case to be predicated on the caprice of executive officers. Where a claim of privilege is made, there must be an appropriate basis for the assertion thereof and whether there is or will not be, is for the Court to determine. *United States* v. *Reynolds,* 345 U.S. 1, 9-10, 73 S. Ct. 528, 533.

The Appellate Division in *O'Neil* v. *Mabstoa,* 72 A.D. 2d 185, 277 N.Y.S. 2d 771 (1st Dept. 1967), in denying defend-

ant's motion for a protection order stated:

> "Any writing produced in the course of public utilities investigation of accidents either by way of report or of notes of persons engaged in investigations would be discoverable if inquiry was for the purpose of avoiding practice required to produce them and eliminating personnel proned to cause them."

In a similar ruling, in *Schwartz* v. *Sommer* (Index #18056/72 November 13, 1973), Justice Stecher in directing discovery and inspection of a Board of Inquiry Report stated:

> "The Court finds that there is nothing of a confidential nature in the information in the possession of the City which it is entitled to withhold from these litigants. The parties seek to ascertain whatever evidence there is concerning their litigation and the City of New York cannot have its records insulated from such inquiry."

In the within case, the desire of the City to maintain secrecy for "future candor" is certainly more than overcome by the desire for litigants to discover what caused the deaths of their intestates. Additionally, as the material is not available from any other source and cannot be reproduced, the interests of justice demands the disclosure.

Contra to appellant's assertions, Judge Knapp recognized that *Cirale* did not hold the Board's report privileged, furthermore he clearly understood the existence of the common law "privilege" of governmental information and the balancing of interest's test as expounded by the State Court of Appeals. Judge Knapp's holding that the Board's report was not privileged was based on the record before him which failed to establish even a minimal showing necessary to support a claim of privilege.

Furthermore, in an effort to accommodate both parties, Judge Knapp referred this matter to *Magistrate Jacobs, who did in fact conduct an in camera inspection of the report,* and after reviewing the entire report held the bulk of the report not privileged. Surely, this was in accord with *Cirale* which alludes to the propriety of in camera inspection and a specific showing to support a claim of privilege.

In the final analysis, the City has failed to make any showing affording their right to either category of privilege and as a result their claims must be denied.

POINT III

The Freedom of Information Law mandates disclosure.

On September 1, 1974, New York became one of the first states to effect a "Freedom of Information Law". Patterned after the Federal Freedom of Information Act, the Law marked the beginning of complete disclosure of governmental information on all levels of government in New York State.

The Freedom of Information Law is designed to make available to the public all documents generated by, and in the possession of government unless a compelling reason requires their confidentiality. The Law's statement of legislative intent declares "that government is the public's business and that the public, individually and collectively and represented by a free news media, should have unimpaired access to the records of government." Similarly, the Sponsor's Memorandum expresses the intent of the measure as guaranteeing "the access of the public to government records". In signing the legislation, Governor Wilson stated:

> As government has grown and become more sophisticated and complex, so too has it become more remote from the people and more difficult to comprehend in all of its workings. These bills will provide, for the first time in New York State, a structure through which citizens may gain access to the records of government and thereby gain insight into its workings.

Prior to the adoption of the Freedom of Information Law, statutory and case law in New York assured the public's right to review governmental records, but failed clearly to define the records available or to establish procedures for making them available. Courts indicated that

legislative policy was to make all records, papers and documents kept in public offices available for inspection in the absence of specific prohibitions or rules to the contrary. Furthermore, the right of the public to know of governmental operations and inspect public records was held to be fundamental to the workings of a democratic society. In many situations, however, the public's right to access was denied because of determinations that the situation did not come within the general "common law" right to inspect documents. Thus, whether a record in custody of a public officer was available for public inspection had been held to depend upon the nature of the document or the interest of the individual seeking the information.

Although the Law enumerates documents that are subject to inspection, the list is not intended to be exhaustive, but merely to indicate the nature of the documents that are to be made available to the public:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases,

(b) Those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data, or other materials constituting statistical or factual tabulations which led to the formulation thereof . . .

In requiring the disclosure of background information the New York Freedom of Information Law goes far beyond the Federal Act's requirement regarding the disclosure of statements of policy and interpretations which provides an exemption for inter-agency memoranda. Further, the rules of discovery normally available in the event of litigation concerning a determination should not be affected.

Other documents which an agency must make available include:

(c) Minutes of meetings of the governing body, if any, of the agency of government and of public hearings held by the agency;

(d) Internal or external audits and statistical or factual tabulations made by or for the agency;

(e) Administrative staff manuals and instructions to staff that affect members of the public;

(f) Police blotters and booking records.

The law then goes on to spell out rules to prevent the disclosure of information in violation of a person's right of privacy. An unwarranted invasion of privacy includes, but is not limited to the following:

(a) Disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the agency or municipality;

(b) Disclosure of employment, medical or credit histories or personal references of applicants for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure;

(c) Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

(d) The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fundraising purposes;

(e) Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality.

In addition to the exemptions designed to insure protection of an individual's right of privacy, the new law specifically does not apply to information that is:

(a) Specifically exempted by statute;

(b) Confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise, including trade secrets, or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise, but this exemption shall not apply to records the disclosure or publication of which is directed by other statute; . . .

(d) Part of investigatory files compiled for law enforcement purposes.

It is clear that it is the latter sections which Judge Jasen referred to in the *Cirale* footnote as not being abolished by the new Freedom of Information Law and it is further abundantly clear that the City's claim of privilege in the instant case fails to fall under any of these exemptions and as a result the new law applies. See McKinneys Public Officers Law § 85; *Brockway* v. *Department of the Air Force* (21974 N.D. Iowa) 370 F Supp. 738; *Kreindler* v. *Department of Navy* (1974 S.D.N.Y.), 372 F Supp. 333.

POINT IV

The equipment involved in the explosion is either missing or has been irreparably altered.

Mr. Beck in his affirmation in support of the motion to quash plaintiff's subpoena asserted that all equipment and apparatus taken from the situs of the explosion had been returned to the building owner. At the time of this statement plaintiff made inquiries of the attorney for the building owner for verification of this fact. Plaintiff was later informed that the bellows (expansion joint), certain anchors and guides involved in the explosion had been returned to the owner in November, 1972. A discovery and inspection of this equipment was had by plaintiff's experts, Dr. Kenneth C. Russell and Dr. Stephen P. Loutrel, both of the Massachusetts Institute of Technology, along with the other parties to the lawsuit in January, 1975. We have been advised by them that destructive testing had been performed by the City on the bellows and further that the self-equalizers which had functioned around the bellows were missing and thus it was extremely difficult for them to give an opinion as to the causal factors leading to the rupture of the bellows. They have also indicated that one of the possible causes or factors which may have led to this explosion was the operation of the bellows or expansion joint in a severely misaligned state or in an improperly anchored position but could not elaborate any further on this point as there was no information of the physical description of how this equipment looked immediately after the accident and the manner of removal of the equipment by the Board's employees or agents following the explosion.

There can be no doubt that knowledge of how the equipment was removed and a physical description of the explosion situs lies exclusively with the appellant as they were the first ones to gain entry after the explosion. What they found and what they saw can never be reproduced? Nor will the parties to this lawsuit be able to reconstruct the

exact positions of the bellows, guides, anchors and equalizers as they were found by the Board and ultimately removed after the explosion.

It is respectfully submitted to this Court that where a person slips on a banana peel, more information would be available from official sources than in a holocaust such as the one here.

In the case of *Frank* v. *25 Associates* the Supreme Court, in granting plaintiff's motion for discovery and inspection of reports prepared by the Department of Buildings and the Fire Department dealing with an explosion which resulted in 15 fatalities, "failed to find any basis for the claim of privilege asserted by the City under Sections 1113 and 1114 of the New York City Charter." The Court went on to state that *"as the information sought to be obtained from the instant records appears to be no longer available for any other source, the interests of justice dictate the disclosure herein authorized"* (NYLJ 9/22/72 p. 11). See also *Montgomery Ward Co.* v. *City of Lockport,* 255 N.Y.S. 2d 433; *Application of Heller,* 184 Misc. 75, 53 N.Y.S. 2d 86; Wigmore, *Evidence* § 2374(4).

In view of the foregoing, the disclosure of the Board's findings is clearly warranted and to hold otherwise will only result in injustice and undue hardship to the litigants. *Sucrest Corp.* v. *Fisher Gov't Company* (1971), 36 A.D. 2d 702, 319 N.Y.S. 2d 94.

POINT V

The City has waived its privilege with respect to this material.

The governmental privilege against disclosure of official information and papers is waived where a copy of the privileged document is placed in the hands of one of the parties. *Fireman's Fund Indem. Co.* v. *United States* (1952, D.C. Fla.) 103 F Supp. 915.

In the above case which involved a libel in admiralty filed against the United States in connection with an accident which had occurred on a vessel owned by the United States and completely in charge of Navy personnel. The libellant made a motion to require the United States to produce for inspection statements of all witnesses made to investigating navy personnel during the course of the investigation of the accident and the testimony of all witnesses as well as the exhibits pertaining to the accident received in evidence by the Navy Court of Inquiry. The Secretary of the Navy filed with the Court a memorandum asserting the privileged and confidential status of these records under 5 USC § 22 and Article 1251 of the Navy Regulations, 1948. The decision was made to depend upon whether the Navy had already furnished the proctor for the United States, with the documents, since in such a case the documents had lost their privileged and confidential status.

In *Cronan* v. *Dewavrin,* it was held proper for the plaintiff in an action for professional services rendered by him as attorney for the defendant to take the deposition of a foreign government witness even though such witness' testimony was clearly privileged *where that witness had expressed his willingness to testify.* (1949 D.C. N.Y.) 9 FRD 337. See also *Bank Line* v. *United States* (1948 D.C. N.Y.) 76 F Supp. 801; *Federal Savings and Loan Ins. Corp.* v.

First National Bank (1944 D.C. Mo.) 3 FRD 487; *Zimmerman* v. *Poindexter* (1947 D.C. Hawaii) 75 F Supp. 933.

In the case at bar, *assuming arguendo,* that a privilege did exist with respect to the material requested, that privilege was destroyed when Mr. Aranow stated to the litigants he would release the information and did in fact allow several parties to read and inspect the entire Board's report, thus placing the plaintiff-appellee, who had no opportunity to view the report, at a great disadvantage in the continued prosecution of this action. There has been also been a further waiver with respect to the Board's recommendations and proposals which were made public after the final determination of the Board in 1972.

CONCLUSION

The order of Judge Knapp should be affirmed with costs in all respects.

Respectfully submitted,

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United States Court of Appeals
for the Second Circuit

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Mattie G. Dixon as Administratrux of the Esate of L.C. Sherman Jr.,

Plaintiff-Appellee

vs.

80 Pine Street Corp. et al.

Defendants-Appellees

City of New York, et al.

Appellants

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Harry H. Lipsig Esq. being duly sworn,

deposes and says that he is over the age of 21 years and resides at
Levittown, New York

That on the 21st. day of March , 19 75

he served the annexed brief upon

1. W. Bernard Richland
Corp. Counsel, of the City of New York
Municipal Building
New York, New York

2. Morris, Duffy, Ivone & Jensen Esqs.
233 Broadway
New York, New York

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10 Rockefeller Plaza
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4. Hart & Hume Esqs.
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6. McNulty & McNulty Esqs.
30 East 42nd. Street
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7. Williams & O'neill Esqs.
130 East 15th. Street
New York, New York

in this action, by delivering to and leaving with said attorneys three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 21st. day of March, 1975

Raymond J. Dowd

Robert W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975